No. 96-1602

In The

Supreme Court of the United States

October Term, 1996

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO PETITION FOR CERTIORARI

The Respondent, Charles Timothy Kling, respectfully prays that the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 6, 1997, be denied.

INTRODUCTION

For the purposes of responding to this Petition, Respondent does not challenge the statements of jurisdiction, constitutional provision involved, or the basis for jurisdiction below made in the Petition for Writ of Certiorari. Respondent does, however, submit a separate statement of facts relevant to the issues presented for review and a statement of the reasons why the writ should not be granted in support of this response.

STATEMENT OF THE CASE

On August 21, 1991, Las Cruces, New Mexico attorney Jerald A. Valentine telephoned the local District Attorney, Douglas Driggers, regarding a case of potential criminal custodial interference. Mr. Valentine told District Attorney Driggers that he represented Ronald Roberts, the father of two minor children over whom Mr. Roberts had primary physical custody. Mr. Roberts and his sons lived in Las Cruces, Dona Ana County, New Mexico. Petitioner Susan Lynn Roberts had rights of visitation, including six (6) weeks of summer visitation.

Mr. Valentine informed the District Attorney that in the summer of 1991, Petitioner requested that Mr. Roberts deliver the children to her in El Paso, Texas so she could take them with her back to her home in Oregon. El Paso adjoins Las Cruces, and houses the only major airport in the region. Mr. Roberts drove from Las Cruces to El Paso to deliver the children

only after agreeing with Petitioner that the children would be returned to him two days before they were to start school in Dona Ana County, New Mexico.

Shortly before school was to start, Petitioner told her ex-husband over the phone that she would not return the children to him as she had agreed and consistent with the court-ordered parenting plan. Mr. Roberts promptly reported that conversation to Mr. Valentine, who contacted Petitioner's attorney. After discussions with Petitioner, her attorney informed Mr. Valentine that the children would be returned to New Mexico on August 21, 1992, and relayed the flight information. Mr. Roberts met the designated flight, however, the children were not on the plane.

Mr. Roberts then contacted an Oregon attorney to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Petitioner. After attempted service of the warrant on August 21, 1992, the Oregon attorney informed Mr. Roberts that the deputy sheriff was told that Petitioner had left her home and had taken the children to Alaska.

After receiving all of this information from Mr. Valentine, District Attorney Driggers reviewed the essential elements set forth in the New Mexico custodial interference statute, and asked Mr. Valentine additional questions regarding the basis for his belief that a crime had been committed. He then told Mr. Valentine that he would send an investigator, Respondent Timothy Kling, to confirm certain factual allegations presented to him by Mr. Valentine. District Attorney Driggers believed that if Mr. Kling was able to verify Mr. Valentine's allegations, then probable cause existed to believe that the Petitioner had committed a crime.

Respondent Kling verified the specific information presented to District Attorney Driggers by Mr. Valentine. District Attorney Driggers then made the decision to prosecute the Petitioner. The criminal complaint was drafted and approved by Alfred J. Perez, the Chief Deputy District Attorney and signed by Respondent. The complaint was then taken to a local magistrate, who reviewed the complaint for legal sufficiency and approved the arrest warrant. Respondent then filed the charges at the direction of the district attorney and the chief deputy district attorney.

Petitioner was eventually arrested on November 24, 1992 pursuant to that warrant. At the time of her arrest, she had possession of the two children and had not had additional contact with Mr. Roberts. Petitioner was extradited to New Mexico, and a local judge found probable cause for the charges.

Five months later, in July, 1993, Petitioner's attorney filed a motion to dismiss based on lack of jurisdiction. There, for the first time, Petitioner argued that any actions which she had taken that were the subject matter of the criminal charges were not taken within the State of New Mexico. The district judge granted the motion to dismiss, and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Petitioner brought suit against Respondent Kling, alleging violation of her civil rights pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of New Mexico. That court entered summary judgment on behalf of Respondent Kling, finding that Respondent was entitled to both absolute and qualified immunity from suit under 42 U.S.C. § 1983. Petitioner Roberts appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the ruling of the district court, holding that Respondent was absolutely immune from suit. The Tenth Circuit, therefore, did not reach

the issue of qualified immunity raised as an alternative grounds for summary judment by the district court.

REASONS FOR DENYING THE WRIT

In a careful and reasoned opinion, the United States Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court for the District of New Mexico granting Respondent Kling absolute immunity. The Tenth Circuit's decision conforms to the well established law of this Court and is consistent with that of other courts of appeal. Consequently, there is no compelling necessity for this Court to grant certiorari so that the Tenth Circuit's decision can be reviewed.

The scope of absolute immunity is neither novel nor vague. This Court has directed lower courts to "examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [to] seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). As the Tenth Circuit noted in this case, absolute immunity "is justified and defined by the functions it protects and serves, not by the person to whom it attaches." *Roberts v. Kling*, 104 F.3d 316, 318 (10th Cir. 1997), quoting *Mee v. Ortega*, 967 F.2d 423, 425 (10th Cir. 1992).

This Court has never wavered from its holding in *Imbler v. Pachtman*, 424 U.S. 409 (1976) that state prosecutors are entitled to absolute immunity from suits brought pursuant to 42 U.S.C. § 1983 for activities within the scope of their prosecutorial duties. *Id.* at 420. Incorporated within the broad ambit of prosecutorial duties entitled to absolute immunity are those activities that are "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution." *Id.* at 430-31.

This Court has distinguished between those acts which were purely investigatory from those which were intimately associated with the judicial phase of the criminal process. *Burns v. Reed,* 500 U.S. 478 (1991). Thus, the pre-prosecution interview of a witness by a prosecutor in an attempt to obtain information so that a probable cause determination might be made is likely not to be given absolute immunity. *See, e.g., Joseph v. Patterson,* 795 F.2d 549, 555 (6th Cir. 1986). However, acts such as filing of a criminal information or whether and when to prosecute are clearly entitled to absolute immunity. *Imbler v. Pachtman, supra,* 424 U.S. at 431, n. 33.

The Tenth Circuit, among others, has held that a prosecutor's seeking of an arrest warrant is an integral component of the decision to initiate a prosecution. *Roberts v. Kling, supra,* 104 F.3d at 320 (*quoting Lerwill v. Joslin,* 712 F.2d 435, 437 (10th Cir. 1983)); *Schnecker v. City of Sioux City,* 107 F.3d 662 (8th Cir. 1997); *Pinaud v. Suffolk,* 52 F.3d 1139, 1150 (2d Cir. 1995); *Ehrlich v. Giuliani,* 910 F.2d 1220, 1223 (4th Cir. 1990); *Joseph v. Patterson,* 795 F.2d 549 (6th Cir. 1986). The reasoning of those decisions is compelling when the nature of arrest warrants is considered. As the Tenth Circuit held in *Lerwill, supra,* "The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his 'initiation of a prosecution' under Imbler [*v. Pachtman,* 424 U.S. 409 (1976)]."

An arrest warrant approved by a prosecutor is not an investigatory tool. Nor is it the product of ill-considered whim or the caprice of a police officer. Inherently, a charging decision has been made by a prosecutor at the time such an arrest warrant has been issued. Consequently, the arrest warrant is an integral

component of initiating a prosecution. And even as the decision of whether or when prosecution should occur is entitled to absolute immunity, so is the decision of whether, when and how an arrest warrant should be requested.

The Tenth Circuit's opinion in this case is in concert with this Court's holding in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, this Court denied absolute immunity to a police officer who sought an arrest warrant following his investigation of the defendants. The fact that the petitioner in *Malley* was a police officer as is the Respondent herein is not relevant. A determination as to whether absolute immunity is warranted must be made by determining the function that the police officer's acts serve. The function of the officer's acts in *Malley* was to serve as the sole impetus for the investigation and arrest of the respondent. Indeed, the officer in *Malley* investigated the alleged criminal activity, prepared complaints and arrest warrants and then presented them to a judge for signature. No prosecutorial involvement in the decision to prosecute is indicated at any point prior to the arrest of the respondents in *Malley*.

In this case, the determination to charge Petitioner Roberts had already been made by the District Attorney, and the application for a search warrant formally approved by the Chief Deputy District Attorney. The function of Respondent Kling's affidavit was merely to implement the determination to prosecute Mr. Kling that had already been made by the District Attorney.

Focus on the function of Respondent Kling's acts, rather than on the power of the actor or the actual act itself is completely consistent with this Court's rulings in *Malley, supra* and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). In *Buckley*, this Court considered the claim that prosecutors had fabricated evidence in order to support a prosecution. This Court concluded that

the prosecutors' acts in endeavoring to find out whether certain bootprints had been made by the plaintiff were made as investigators looking for clues and corroboration that might give them probable cause to arrest, and denied the prosecutors absolute immunity.

In *Buckley,* as in *Malley,* the Court's rulings hinged not on the actors involved nor their specific acts, but upon the function of the acts themselves. Thus in *Buckley,* the Court's opinion did not concentrate on the distinction between a prosecutor or police officer, but rather on the functions of the prosecutor's acts. This Court found the prosecutor's acts in *Buckley* to be "entirely investigative in character." *Id.* at 274. The Court distinguished those investigative acts from the acts of an advocate by stating that "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.*

In this case, there is no dispute that District Attorney Driggers and Chief Deputy District Attorney Perez had made a probable cause determination prior to ordering Respondent Kling to seek an arrest warrant. Their decision was consequently in their role as advocates rather than as investigators. The function of Respondent Kling's act of signing the arrest warrant he was instructed to obtain was to assist prosecutors acting in their role as advocates. As such, he is entitled to absolute immunity.

The Tenth Circuit's holding in this case followed the well established, functional analysis dictated by this Court. Accordingly, the result which the Tenth Circuit obtained from that analysis is appropriate and consistent with law. The Tenth Circuit examined the function of Respondent Kling's acts. It found that any material act of Respondent Kling was performed after the complaint that established probable cause was signed

by the prosecutors. Consequently, the Tenth Circuit was able to determine, consistent with this Court's holdings, that the function of any acts of Kling was consistent with the prosecutor's roles as an advocate, and thus entitled to absolute immunity.

Petitioner seeks to have this Court reweigh the Tenth Circuit's evaluation of the function of Respondent Kling's acts. The ambit of the law related to absolute immunity is well settled and clear. There is no compelling interest of justice in having this Court reweigh the well reasoned and specific determination in a well settled area of law.

Protection of the absolute immunity accorded to the prosecutor's advocacy function is essential to the administration of justice. To diminish that protection would cause the public trust of the officer to suffer, since the prosecutor would be constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. *Imbler, supra*, 424 U.S. at 424. This Court has already weighed that balance, and determined that absolute immunity of prosecutors and their agents acting in the role of advocates, after probable cause has been determined, is appropriate and necessary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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